Nos. 89-1433 & 89-1434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Appellant,

—v.—

SHAWN D. EICHMAN, *et al.*,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

—v.—

MARK JOHN HAGGERTY, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT OF WASHINGTON

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF THE NATIONAL CAPITAL AREA, ACLU OF WASHINGTON, AND THE AMERICAN JEWISH CONGRESS IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 9

I. THE FLAG PROTECTION ACT FORBIDS POLITICAL SPEECH THAT LIES AT THE CORE OF THE FIRST AMENDMENT 10

II. THE FLAG PROTECTION ACT REGULATES SPEECH SOLELY BECAUSE OF ITS CONTENT 15

III. NO COMPELLING GOVERNMENT INTEREST UNRELATED TO THE SUPPRESSION OF EXPRESSION CAN JUSTIFY THE FLAG PROTECTION ACT'S INFRINGEMENT OF FREEDOM OF SPEECH 21

A. The Act Fails Strict Scrutiny 22

B. The Act Fails The *O'Brien* Test 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Arcara v. Cloud Books, Inc.,
478 U.S. 697 (1986) 19

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 22

Block v. Meese,
793 F.2d 1303 (D.C.Cir. 1986) 23

Boos v. Barry,
485 U.S. 312 (1988) 16, 22

Bowen v. Roy,
476 U.S. 693 (1986) 5, 20

Brandenburg v. Ohio,
395 U.S. 444 (1969) 23

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 11, 12

Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984) 20

Cohen v. California,
403 U.S. 15 (1971) 13

Hustler Magazine v. Falwell,
485 U.S. 46 (1988) 7, 13

Miller v. California,
413 U.S. 15 (1973) 12

New York Times v. Sullivan,
376 U.S. 254 (1964) 12

New York v. Ferber,
458 U.S. 747 (1982) 13

Page

Rankin v. McPherson,
483 U.S. 378 (1987) 14

Smith v. Goguen,
415 U.S. 566 (1974) 4, 6, 7, 10, 16

Spence v. Washington,
418 U.S. 405 (1974) 10

Street v. New York,
394 U.S. 576 (1969) 6, 10

Terminiello v. Chicago,
337 U.S. 1 (1949) 13

Texas v. Johnson,
491 U.S. ___, 109 S.Ct. 2533 (1989) . . . . . *passim*

United States v. O'Brien,
391 U.S. 367 (1968) . . . . . *passim*

Virginia State Board of Pharmacy v. Virginia Citizens Council,
425 U.S. 748 (1976) 12

Ward v. Rock Against Racism,
491 U.S. ___, 109 S.Ct. 2746 (1989) 19

West Virginia Board of Education v. Barnette,
319 U.S. 624 (1943) 24

Wooley v. Maynard,
430 U.S. 705 (1977) 24

Statutes and Regulations

Flag Protection Act of 1989,
Pub.L.No. 101-131, Stat. 777,
amending 18 U.S.C. §700, et seq. . . . . *passim*

Page

Texas Penal Code Ann. §42.09(b) 15

Legislative History

Hearings on S. 1338, H.R. 2978, and
S.J. Res. 180, August 1, 1989,
Serial No. J-101-33,
101st Cong., 1st Sess. 2, 17, 20

Other Authorities

25 Weekly Comp. Pres. Doc. 1619
(October 26, 1989) 2

Code Penal of France,
Article 26, L. no. 72-546
de 1er juill. 1972 14

Ely, "Flag Desecration: A Case Study in
the Roles of Categorization and Balancing in First Amendment Analysis,"
88 Harv.L.Rev. 1482 (1975) 19, 22, 24

English Statute of Treason 14

Penal Code of German Federal Republic,
section 90a (1987) 14

Stone, "Flag-Burning and the Constitution,"
75 Iowa L.Rev. 111 (1989) 20

Tribe, *American Constitutional Law*,
(1st ed. 1978) 23

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to preserving the principles of liberty and equality embodied in the Bill of Rights. The ACLU of the National Capital Area and the ACLU of Washington are local affiliates in the judicial districts where these cases arose.

Since its founding in 1920, the ACLU has been a vigorous advocate of the right of free expression. In that role, the ACLU has appeared before this Court in scores of First Amendment cases, both as direct counsel and as *amicus curiae*. Like last year's decision in *Texas v. Johnson*, 491 U.S. ___, 109 S.Ct. 2533 (1989), these cases raise fundamental issues about political protest in a free society. The outcome of these cases is therefore a matter of central concern to the ACLU.

The American Jewish Congress is a national organization of American Jews founded in 1918 to protect the civil, religious, economic and political rights of American Jews. The carrying out of those purposes presupposes a broad right to freedom of speech, particularly political speech. American Jewish Congress has therefore consistently opposed efforts, such as the one at issue here, to narrow the scope of those freedoms.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

The Flag Protection Act of 1989[2] was passed in swift response to this Court's decision in *Texas v. Johnson*, 109 S.Ct. 2533 (1989). Johnson had burned an American flag as part of a demonstration against Reagan administration policies. The Court overturned as violative of the Constitution his conviction under a Texas statute making it a crime to "deface, damage, or otherwise physically mistreat in a way the actor knows will seriously offend one or more persons likely to observe or discover his actions." *Id.* at 2537 n.1. Concerned about the implications of this decision for the validity of the federal flag protection statute, Congress held hearings and sought to devise a statute that would survive constitutional challenge. The Department of Justice took the position that no statute both comporting with the First Amendment and sufficient to protect the flag against insult could be devised, and that therefore a constitutional amendment was necessary. Others disagreed,[3] and the statute at issue here was enacted into law without the President's signature. The President, who favored a constitutional amendment, stated "his serious doubts that [the legislation] can withstand Supreme Court review . . . ." 25 Weekly Comp. Pres. Doc. 1619 (October 26, 1989).

Appellees in these consolidated cases were charged with burning flags of the United States in violation of the Act. The charges relate to two separate incidents, one at a demonstration outside the Capitol in Washington, D.C., the other at a rally outside a post office in Seattle, Washington. Both incidents took place shortly after the Act became law on October 28, 1989.

It is alleged that the flag burned in the Seattle incident was the property of the United States Postal Service. That circumstance, however, was the subject of a separate charge of willfully injuring property of the United States. That charge is not before the Court in this case and was brought under a separate provision from the one involved here. *Amici* do not contest the validity of a statute making criminal the destruction of the flag when it is government property or the property of another. Nor is there an issue here about the propriety of more serious penalties for the destruction of the property of another, when that property might have special significance for its owners.

The likelihood that the acts charged here would provoke violent reactions or otherwise lead to a breach of the peace was not made part of the charge, was not considered below, nor would it have been relevant under the Act. Similarly, any words spoken in connections with the acts of flag-burning are, and under the Act must be, irrelevant to the charges brought. Thus, the only matter charged and the only issue presented is the burning of the flag itself.

The District Courts for the District of Columbia (June L. Green, J.) and for the Western District of Washington (Rothstein, J.) both concluded that the Act, as applied to appellees' conduct, violated the First Amendment of the United States Constitution, and accordingly granted the motions to dismiss the informations. Both courts concluded that the Act sought to punish expressive conduct, protected by the First Amendment, and that no governmental interest sufficiently compelling to survive strict scrutiny had been advanced to justify the Act. The courts rejected the argument of the United States that the very enactment itself and the President's call for a constitutional amend-

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[2] Pub.L.No. 101-131, 103 Stat. 777 (*amending* 18 U.S.C. § 700). The amended Act now provides, in pertinent part: "Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both."

[3] Hearings on S. 1338, H.R. 2978, and S.J. Res. 180, August 1, 1989, Serial No. J-101-33, 101st Cong., 1st Sess. (Hearings).

ment to overturn this Court's decision in *Johnson* were sufficient evidence of a compelling governmental interest. They rejected the argument of the United States Senate that though the purpose, indeed the only conceivable purpose of the Act, was to protect the value of the flag as a symbol, the fact that the Act made no reference to the actor's purpose was sufficient to make it content-neutral. The use of the criminal law to suppress expression, or (what comes to the same thing) to protect one form of symbolic expression and to prohibit another, is inherently content-related. Also rejected was the argument of the House of Representatives that the Act can stand as a protection of the flag as an incident and indicator of sovereignty. This argument, it was pointed out, is just an assertion in different words of the symbolic value of the flag and of the governmental interest in keeping that symbol from being appropriated to uses the government does not authorize.

Finally, Judge Rothstein rejected the Senate's argument that the Act might be valid under the proposal in Justice Blackmun's dissent in *Smith v. Goguen*, 415 U.S. 566, 590-91 (1974), regarding enactments aimed at protecting the flag's "physical integrity." Judge Rothstein noted that in the *Johnson* case the Court stated that the Texas statute was not designed to protect "the physical integrity of the flag in all circumstances," 109 S.Ct. at 2543, and that therefore the Court had not ruled whether a statute so drawn could withstand constitutional scrutiny. Judge Rothstein concluded that the Flag Protection Act also did not present this question, since it proscribes (though without mentioning the actor's motive) "types of conduct generally associated with disrespect for the flag . . . " while failing to proscribe other kinds of conduct "which also threaten the physical integrity of the flag but which do not communicate a negative or disrespectful message, like flying the flag in inclement weather or carrying it into battle . . . ." J.S.App. at 11a-12a n.6.

SUMMARY OF ARGUMENT

A. The flag is nothing but a symbol. It is only sometimes government property. It is not part of some regulatory scheme -- like the draft card in *United States v. O'Brien*, 391 U.S. 367 (1968), or Little Bird of the Snow's social security number in *Bowen v. Roy*, 476 U.S. 693 (1986). A symbol is only a form of communication. It communicates emotions, ideas, or attitudes. Communicating is what symbols do. And if something is only a symbol it does nothing else than communicate. The strong emotions displayed in the dissent in *Texas v. Johnson* and in the debates on this Act were all concerned with the meaning and power of a symbol, of an instantiated idea.

Burning the flag in the circumstances charged here was also nothing but a symbol. It too was an act of communication and only an act of communication. The crime charged here was not the destruction of another's property. It was not an interference with a government regulatory program. It was not an intrusion on the physical space or tranquility of others. It was not a nuisance or an act of environmental pollution. It was a statement. It was a statement without words -- as a picture, a melody, a statue, or a dance, a mime or a string of semaphore flags are statements without words. It was a statement that appropriated in its syntax the statement which is the flag -- another statement without words. It was a symbolic act, as displaying the flag is a symbolic act. Symbol for symbol. Symbol against symbol. Statement and counter-statement. Burning the flag was as much a statement without words as would be singing the national anthem out of tune. It was as much a statement as drawing a moustache on your own picture of George Washington.

What the government complains about is that appellees have committed blasphemy by desecrating a civic symbol of our nationhood. But our Constitution does

not permit the punishment of blasphemy. Blasphemy is nothing but the utterance (or counter-utterance) of a sentiment or idea inimical to ideas many of us hold sacred.

B. In the series of flag desecration cases beginning with *Street v. New York*, 394 U.S. 576 (1969), through last Term's decision in *Johnson*, dissenting opinions have offered a variety of arguments designed to escape the logic which inexorably leads to the conclusion that statutes such as the one at issue here are nothing but attempts to punish the expression of beliefs and the communication of ideas. It has been argued that such statutes are no less justified than forbidding a person to burn his "shirt or trouser or shoes on the public thoroughfare . . . as a protest against the Government's fiscal policies," *Street*, 394 U.S. at 616 (Fortas, J., dissenting). But, of course, neither here nor in those other cases were the protesters prosecuted under a statute designed to protect health and safety against the untoward effect of such acts of public mini-arson.

More seriously, it has been argued that flag desecration statutes acknowledge a kind of governmental proprietary interests in the flag akin to trademark or copyright. *Smith v. Goguen*, 415 U.S. at 602-03 (Rehnquist, J., dissenting). But it is quite clear that such proprietary interests are recognized to prevent confusion as to the origin of goods or to "promote the Progress of Science and useful Arts," U.S. Constitution, Article I, section 8, and not at all as a means of suppressing the use of particular words or symbols to express opinions disfavored by the government. That you may freely use another's image in a hostile counterstatement was a clear implication of the Court's recent recognition of the central communicative role of, and the corresponding First Amendment protection for, cartoons, satires and caricatures of public figures. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52-55 (1988). Nor can flag desecration statutes be likened to

statutes regulating the reproduction or even the destruction of postage stamps, currency or securities or the unauthorized wearing of uniforms or service medals. *Smith*, 415 U.S. at 595-96. In all those cases the protection of the money supply and the prevention of fraud and confusion are the evident and sufficient justifications. Finally, no regulatory purpose akin even to the paper-thin regulatory justification adduced in *United States v. O'Brien*, 391 U.S. 367, is available or is offered here -- unless it is the forbidden one of regulating the communicative uses to which the flag is put.

The Solicitor General with commendable candor eschews any such labored justifications. Rather he argues that exceptions have always been recognized to the general principle that government may not proscribe expression because of its content -- i.e., that government may not engage in censorship. He instances child pornography, obscenity, false and defamatory speech, speech which is part of a scheme promoting illegal activity, speech leading directly and immediately to violence ("fighting words"). The Solicitor General asks, in effect, that the Court admit just one more exception. But, of course, this argument entirely misses the point of why those exceptions exist. Under this Court's decisions, where the expression is knowingly or recklessly but demonstrably untruthful, it does not contribute to the exchange of ideas. (As the *Hustler Magazine* case shows, where truth -- and thus falsity -- is not the issue, even the most outrageously expressed opinion merits protection, insofar as it does express an opinion.) Similarly, the Court has not regarded obscenity and child pornography as ideas at all -- and when they become ideas the Court has clothed them in First Amendment protection. By definition, they have some redeeming social significance. Finally, fighting words are denied protection not because of their content but because of their very tendency to provoke not thought or verbal response but im-

mediate, thoughtless violence.

So each of these instanced exceptions comes accompanied by a reason showing why, in this Court's judgment, it is not thought or expression which is the subject of regulation after all. The Solicitor General does not, however, offer any such accompanying rationale for adding flag desecration to this (very short) list of exceptions. He argues that the law allows some exceptions so why should it not allow just this one exception more? His reason is not that flag desecration is not political expression and so at the very heart of the First Amendment's concern; not that it in all circumstances has a powerful tendency to provoke immediate violence; not that it asserts palpable untruths. In the end his argument comes down to this: the flag is unique -- a kind of conceptual and constitutional singularity.

One hardly knows how to respond to such an argument, because of course it is not an argument at all. It is a plea that in this case the government be dispensed from the obligation of offering an argument validly distinguishing this case of criminalizing the pure expression of a hated opinion from every other such case, in which the prohibition would surely fail. Suffice it to say that the Solicitor General's demonstration of the flag's particular symbolic and expressive significance only makes more palpable the constitutional impropriety of putting it off limits for those symbolic and expressive uses of which the government does not approve.

C. In this brief we shall show (Point I) that what the Act forbids cannot be relegated to the fringes of the First Amendment assigned to low value speech, of which the only recognized examples are defamation, obscenity, child pornography, and more controversially advertising and so-called "fighting words." Rather the object of the Act is to prohibit expression at the very core of First Amendment concern: political expression offensive to

prevailing opinion and sentiment.

Next, we shall show (Point II) that the prohibitions of the Act are wholly and inescapably content-based. First, it is simply not possible to assign any intelligible purpose to the Act other than the prohibition of one form of expression because of what it expresses. Second, for the same reason the Act cannot be defended as a content-neutral time, place or manner regulation.

Finally, we draw the inescapable conclusion (Point III) that since no other purpose than the suppression of political expression is available to justify the Act, it cannot survive the strict scrutiny the First Amendment requires. Indeed, given the justifications that have been offered or can be imagined for the Act, it cannot survive First Amendment scrutiny at any level.

ARGUMENT

In *Texas v. Johnson*, 109 S.Ct. 2533, this Court declined Texas' invitation to exempt flag-burning from the "bedrock principle underlying the First Amendment": namely, "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544. The Court should likewise decline Congress' invitation here. The Flag Protection Act of 1989 infringes First Amendment liberties no less than did the Texas flag-desecration statute struck down in *Johnson*, and on the authority of that decision, should likewise be struck down.

All sides in this case agree that if flag-burning is punished on the basis of the idea or attitude that it expresses, the First Amendment invalidates the punishment. And so they must, for however fragmented on other points, this Court's four flag desecration rulings over the last two decades unequivocally unite on this

proposition.[4] Faced with this difficulty, the Solicitor General and *amici curiae* supporting his position look to two routes of escape. The first is to attempt to categorize flag-burning out of the First Amendment as unprotected or marginal speech. The second is to portray the Flag Protection Act as regulation of the manner and not the content of expression.

Both these efforts to circumvent this Court's ruling in *Johnson* must be rejected. Here as in *Johnson*, the government seeks to protect the flag solely as a symbol. Here as in *Johnson*, the government would prohibit flag-burning solely for its value as a counter-symbol of political protest. And here as in *Johnson*, no justification for suppressing flag-burning other than symbolism is or can be offered. Accordingly, here as in *Johnson*, the government's attempt to forbid flag-burning must be subject to the strictest scrutiny and, under that scrutiny, must fall.

I. THE FLAG PROTECTION ACT FORBIDS POLITICAL SPEECH THAT LIES AT THE CORE OF THE FIRST AMENDMENT

The Solicitor General and *amici* in support of his position concede, as they must, that flag-burning in the circumstances of these cases constitutes "expressive conduct" or "'symbolic speech'" that was plainly and

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[4] In *Street v. New York*, 394 U.S. 576, and in *Smith v. Goguen*, 415 U.S. 566, this Court invalidated convictions for expressing a contemptuous view of the flag, whether by word (Mr. Street's statement "We don't need no damn flag") or deed (Mr. Goguen's wearing of the flag sewn to the seat of his pants). In *Spence v. Washington*, 418 U.S. 405 (1974), the Court invalidated a conviction for misusing a flag by taping a peace symbol on it -- a statement the Court deemed well "within the contours of the First Amendment," *id.* at 415. And in *Johnson*, of course, this Court invalidated a conviction for burning a flag so as to "seriously offend" others, a basis this Court readily held to be impermissibly content-based.

overtly political. Brief for the United States ("SG Brief") at 22, 28; *see also* Brief for Senator Joseph R. Biden, Jr. as *Amicus Curiae* ("Biden Brief") at 6, 8. Having made that concession, however, the Solicitor General seeks to trivialize flag-burning by categorizing it as speech with little or no value -- no matter how political it is. Flag-burning, argues the Solicitor General, should be relegated to the fringes of the First Amendment, along with "the lewd and the obscene, the profane, the libelous, and the insulting or 'fighting words.'" *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), *cited in* SG Brief at 31-32 & n.25.

But this attempt to categorize flag-burning out of the First Amendment fails. Burning a flag to express symbolic dissent from one's government could hardly be closer to the core or farther from the fringe of the First Amendment. While it is true that this Court has carved out certain "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky*, 315 U.S. at 571, public political statements have never been included among them.

On any theory of the First Amendment, political speech -- and most importantly, political speech critical of government -- is located at the very core. This Court has long protected political dialogue in this country from the spectre of seditious libel and its analogues. Indeed, speech critical of government is the very paradigm of speech protected by the First Amendment. Protecting such speech is essential to freedom, for it ensures that no incumbent regime, no reigning orthodoxy, may entrench itself by undermining dissent.

Accordingly, when this Court has treated a category of expression as unprotected or of low value, and thus as regulable by the state on lesser justification, the Court has taken pains to distinguish such speech from high-value political speech at the core of the First Amend-

ment. For example, libel is unprotected only to the extent it inflicts injury without advancing truth or public debate. *See New York Times v. Sullivan*, 376 U.S. 254 (1964). Obscenity is unprotected only to the extent that it seeks sexual arousal and nothing more. *See Miller v. California*, 413 U.S. 15 (1973). Fighting words are unprotected only insofar as they amount to a punch in the nose -- not an expression of an idea or an opinion. *See Chaplinsky v. New Hampshire*, 315 U.S. 568. And advertising enjoys lesser First Amendment protection only insofar as it affects the hardy channels of commerce -- not the more fragile and therefore more protected channels of political change. *See Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748 (1976).

Flag-burning obviously does not literally fall within any of these existing categories of unprotected or less protected expression. Unlike commercial advertising, its marketplace is only that of political ideas, not goods and services. Unlike libel, it advances an opinion about government, not a falsehood about an individual. Unlike fighting words, flag-burning targets no individual human object and thus cannot "by [its] very utterance inflict injury" in the form of a face-to-face verbal assault. *Chaplinsky*, 315 U.S. at 572. For this reason, this Court flatly rejected the analogy of flag-burning to fighting words in *Johnson*: "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs." 109 S.Ct. at 2542. Finally, unlike obscenity, flag-burning is directed at evoking far more than a mere physiological response -- and has evoked far more, as the extended and highly articulate public debate both in and out of Congress in response to Gregory Lee Johnson's activities amply illustrates.

Nor can these categories of unprotected speech be extended to flag-burning even by analogy. Quite the

contrary, the concededly political character of the flag-burning encompassed by the Flag Protection Act rules out its "excision . . . from the realm of constitutionally protected expression." *New York v. Ferber*, 458 U.S. 747, 754 (1982), *cited in* SG Brief at 30. This is so even if flag-burning is deemed uncivil or impolite. *See* SG Brief at 36-37 & n.29 (claiming that flag-burning offends "decency and civility in discourse" and "the moral sensibility of the community"). For in public clashes over political ideas, dainty rules of etiquette and paternalistic protection of vulnerable sensibilities have long since been ruled out. Like Mr. Terminiello's race-baiting rabble-rousing, *see Terminiello v. Chicago*, 337 U.S. 1 (1949), Mr. Cohen's vulgar epithet against the draft, *see Cohen v. California*, 403 U.S. 15 (1971), and Mr. Flynt's scurrilous caricature of Mr. Falwell, *see Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), flag-burning merits the highest First Amendment protection notwithstanding the deep and well-founded offense it may provoke in its audience. Speech "may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger." *Terminiello*, 337 U.S. at 4. Nor does it matter that the medium chosen is deliberatively provocative; as Justice Harlan wrote for the Court in *Cohen v. California*, "words are often chosen as much for their emotive as their cognitive force." 403 U.S. at 26.

In short, a dissident's flag-burning is high-value political speech at the core of the First Amendment, no less than a speech, a pamphlet, or a satiric cartoon. This Court has long kept the categories of unprotected speech few and narrowly cabined. The Solicitor General's invitation to add a new category -- call it "political obscenity" -- to that short list should be declined for, if accepted, it would truly be the exception that swallowed the rule.

The Solicitor General sweetens his request with the promise that the exception will be narrow; he asks in effect that the Court depart just this once from the firm

general principle that political speech may not be banned as such. But this argument will not do. First, it is essentially lawless. This Court rules by reason, and reason requires that departures from constitutional principles of general application should themselves be principled rather than *ad hoc*. On just that basis, this Court has steadfastly resisted and should continue to resist entreaties to create "a separate juridical category . . . for the American flag alone." *Johnson*, 109 S.Ct. at 2546.

Second, the effort to wall off flag-desecration as a class of one is in any event transparently unavailing. The experience of other nations, with different traditions of free speech and a far more sacral attitude towards the state and its symbols than our own, suggests that whatever can be said about the flag can be said as easily about a constitution, a national anthem, or a national leader. The English Statute of Treason once provided capital punishment for "compassing or imagining the death of the king." The French penal code today makes it an offense punishable by fine and imprisonment to offer insult to the President of the Republic by means of written words, images or broadcasts. Code Penal, Article 26, L. no. 72-546 de 1er juill. 1972. The German Federal Republic makes it a criminal offense to "defame[] the colors, the flag, the coat of arms or the anthem of the Federal Republic or of one of its [states]." Penal Code, section 90a (1987). And doubtless those who "defaced" the flags of the German Democratic Republic or of Romania in the events of 1989 by cutting from their centers their communist symbols committed grave offenses against those countries' then-existing political orders.

This is a direction in which our nation should not move -- not even one step. This Court has already given a full measure of First Amendment protection to statements compassing the death of our President: In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court held that

one could not be punished for saying, "[I]f they go for [President Reagan] again, I hope they get him." There, the sanction was only the loss of a public job, not the one year prison sentence possible here. And there, the contemplated subject was the flesh-and-blood President, not a likeness of the President on paper, canvas, or cloth. Surely it follows *a fortiori* that flag-burning must be given at least as much protection. In our free speech tradition, there is no such thing as the politically obscene.

II. THE FLAG PROTECTION ACT REGULATES SPEECH SOLELY BECAUSE OF ITS CONTENT

Texas v. Johnson reaffirmed emphatically that government may not forbid flag-burning on the basis of its message; the flag may not be preserved as a symbol "only in one direction." 109 S.Ct. at 2546. Accepting this holding, various government officials seek to escape its force by asserting that the Flag Protection Act targets no message and works in no one direction. *See* Biden Brief at 11-16; *Amicus Curiae* Brief of Governor Mario M. Cuomo ("Cuomo Brief") at 4-5, 6-7. These assertions of content-neutrality are untenable.

True, the Texas desecration statute at issue in *Johnson* predicated punishment on the flag-burner's knowledge that his action "will seriously offend one or more persons likely to observe or discover" it. 109 S.Ct. at 2537 n.1, *quoting* Texas Penal Code Ann. §42.09(b). The "seriously offend" clause led the Court readily to conclude that the Texas law was "content-based" and thus subject to "'the most exacting scrutiny.'" As the Court wrote, "Johnson was prosecuted because he knew that his politically charged expression would cause 'serious offense' . . . . Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct." 109 S.Ct. at

2543 (footnote omitted); *see Boos v. Barry*, 485 U.S. 312, 315 (1988).

True as well, the Flag Protection Act contains no "seriously offend" clause. But it simply does not follow, as *amici* Biden and Cuomo would have it (the Solicitor General does not press this point), that Congress' law is therefore content-neutral. *See* Biden Brief at 11-16; Cuomo Brief at 4-5. Nor does it follow that the Act may therefore be sustained on a lenient standard of review. For predicating punishment on the predicted reaction of an audience to the content of a message is just one of the many ways that a law can be content-based. It is not the only one. It is not even a central one. A law can be equally and more obviously content-based if, without reference to audience reaction, it either explicitly restricts speech by reference to its message, or finds its sole justification in interests related to the suppression of expression. The Flag Protection Act falls under both descriptions.

First, the language of the Flag Protection Act, even without a "seriously offend" clause, explicitly disadvantages selected viewpoints. Even assuming that a law that was genuinely designed to protect the physical integrity of the flag in all circumstances would be valid,[5] the Flag

[5] The Court has never held as much, but occasional dicta in opinions suggest this possibility. *See, e.g., Johnson*, 109 U.S. at 2543; *Smith v. Goguen*, 415 U.S. at 591 (Blackmun, J., dissenting). The suggestion, however, is mysterious. For protecting a flag from physical destruction in all circumstances protects not a thing -- the flag is not a discrete material entity -- but rather protects an idea embodied in symbolic form. Just as a constitution is a locus of ideas embodied in words and instantiated in physical entities when those words are printed upon a page, so too the symbolism of the flag is physically instantiated in material flag-like objects. The same holds true for the National Anthem and likenesses of George Washington or George Bush. Thus, even a statute that did protect flags in all circumstances would not be at all like a statute protecting the physical integrity of the (continued...)

Protection Act is not such a law. Rather, like earlier federal statutes proscribing "contemptuous" treatment of the flag, and like Texas' proscription of "offensive" treatment of the flag, the Flag Protection Act surrounds its proscription of flag-burning with a list of expressively charged acts. "Mutilation," "defacement," "defilement," and "trampling," for instance, all connote hostile treatment of the flag. Far from protecting the physical integrity of the flag in all circumstances, these terms protect the flag only from those who would hurt it or cast it in bad light -- exactly the content-based approach rejected in *Johnson*. Furthermore, §700(a)(2)'s explicit exemption for cremation of "worn or soiled" flags -- a mode of flag-burning traditionally associated with the highest patriotic respect -- only underscores the viewpoint discrimination also inherent in the statute.

It is no answer to assert that, notwithstanding its charged language, the Flag Protection Act will be applied across the board to all physical violations of the flag whatsoever, for that is obviously as a practical matter impossible. No rational prosecutor will proceed, for example, against the child who crumples up a flag-emblazoned paper cup at a Fourth of July picnic.[6] But the very degree of discretion thus lodged in enforcement officials only underscores the inescapable content-based suppression of ideas underlying the Act. It is workable only if limited to those at whom it was "really" ad-

[5] (...continued)
President in all circumstances. Rather such a law would be analogous to a statute protecting the physical integrity of *representations* of the President in all circumstances -- an analogy that demonstrates such a law's constitutional deficiency.

[6] This example was put by William P. Barr, Assistant Attorney General of the United States, Office of Legal Counsel, in his statement to the Committee on the Judiciary of the United States Senate, Hearings at 88.

dressed.

Even if the language in the Act or its likely pattern of enforcement could boldly be characterized as viewpoint-neutral, however, there is a second and more fundamental reason why the Act is nonetheless viewpoint and content-based nonetheless. The reason is that protecting the flag qua flag aims irreducibly at the suppression of expression. The only purpose available to justify such a law, or indeed advanced in this case, is the protection of a symbol -- as the Solicitor General puts it, the "unique symbol of our Nation." SG Brief at 29; *see* Biden Brief at 19-21. Protecting the flag as a symbol against symbolic attack has no instrumental purpose beyond the suppression of an offensive expression. It is not a means to any other end. Rather, it is the consecration of a symbol for its own sake; a ban on those who commit blasphemy against that symbol. And protection of a symbol is necessarily "related to the suppression of expression." 109 S.Ct. at 2542. For protecting something as a symbol has no meaning other than protecting a form of expression, here political expression, from symbolic contradiction or symbolic appropriation to the flag-burners' own political opinion.

This Court held as much in *Johnson*. There, the Court switched the case onto the track of strict scrutiny because it found the only state interest implicated in the case -- "preserving the flag as a symbol of nationhood and national unity," 109 S.Ct. at 2542 -- to be necessarily related to the communication of ideas. "The State, apparently, is concerned that [flag-burning] will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as a nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related 'to the suppression of free

expression'. . . ." *Id.* The same is true here, where again the only interest implicated or asserted is the protection of the symbolic value of the flag.

For these reasons, the standard of review set forth in *United States v. O'Brien*, 391 U.S. 367, for laws "unrelated to the suppression of expression" is inapposite here. So is the deferential standard of review applicable to "time, place, or manner" restrictions on expression in public forums. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746 (1989). In ignoring the force of *Johnson* and urging application of such standards here, *amici* on the government's side, notably Senator Biden, make a fundamental mistake. *See* Biden Brief at 8-9, 13-16, 23-24 n.8.

That mistake is to confuse anti-flag-burning laws with laws that serve some function unconnected with ideas. Of course laws against "[v]andalism, terrorism, or public nudity" are valid notwithstanding any incidental effect they might have upon vandals, terrorists, or latter-day Lady Godivas with a political message. *See* Biden Brief at 8, 24 n.8. The same is true of laws that forbid brothels, the Court has held, whether situated in bookstores or bakeries, *see Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), or speeding laws even when applied to the anchor of the evening news en route to work, *see id.* at 708 (O'Connor, J., concurring). Similarly, it was crucial to upholding the conviction in *O'Brien* that the government relied, in Professor Ely's words, on "interests, having mainly to do with the preservation of selective service records, that would have been equally threatened had O'Brien's destruction of his draft card totally lacked communicative significance -- had he, for example, used it to start a campfire for a solitary cookout or dropped it in the garbage disposal for a lark." Ely, "Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis," 88 Harv.L.Rev. 1482, 1498 (1975). Like all of these

content-neutral laws, "manner" restrictions -- such as bans on camping overnight at the capital's most frequented public parks, *see Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) -- likewise turn on harms that can be understood and proscribed without any reference to expression. But the Flag Protection Act is fundamentally different from all such laws.

Unlike draft cards, whose maintenance in the possession of potential draftees was deemed in *O'Brien* to ensure efficient conscription in times of national security emergency, or Social Security numbers, whose attribution to individuals facilitates the administration of the government welfare system, *see Bowen v. Roy*, 476 U.S. 693, the private possession of flags serves no function for the government unrelated to expression. And in contrast to bans on vandalism, terrorism, or public nudity, anti-flag-burning laws stand or fall on their protection of a symbol. Stripped of the rationale of protecting the symbolic value of the flag, no rationale remains for a flag-burning prohibition. Stripped of the mantle of political protest in which Lady Godiva cloaked her public nudity, the prohibition of nudity remains.[7]

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[7] Defenders of the Flag Protection Act have also tried to analogize it to protection of gravesites or bald eagles. *See* Biden Brief at 14-15; Testimony of Laurence H. Tribe before the Senate Judiciary Committee, Hearings at 151-52; Stone, Flag-Burning and the Constitution, 75 Iowa L.Rev. 111, 120-21 (1989). But these examples, like Lady Godiva, miss the point. The deficiency of the Flag Protection Act is not that it protects a symbol, but that it protects *only* a symbol. Bald eagles, like spotted owls or United States Presidents, are animate objects and their protection has something irreducible to do with the sanctity of life. Gravesites are resting places for the dead, and so are at least connected with respect for human life; they are also frequently connected with religious sensibilities that have traditionally received special protection under the Free Exercise Clause. But the flag is not animate; it is a symbol only. And a free democratic society can tolerate no code of *civil* blasphemy. Accordingly, the analogy to bald eagles and to gravesites is inapt.

Time, place, and manner analysis would be appropriate if appellees were before this Court for violating laws prohibiting the setting of fires in public streets or places. But, of course, the statutory language the Court considers here is not of that sort at all. It does not prohibit burning a copy of the United States Constitution or yesterday's newspaper in public, but may prohibit crumpling up and tossing in a wastebasket a paper representation of the flag. Appellees no more violated an anti-fire ordinance than Mr. Goguen violated a sewing code.

Try as they may, then, the Solicitor General and his *amici* cannot avoid explaining this statute as a protection of the flag as a symbol -- and nothing else. Accordingly, it is both viewpoint and content-based. Thus, the appropriate standard of review is the most exacting one. In sum, the Flag Protection Act is invalid unless it advances closely some compelling interest other than the suppression of expression.

III. NO COMPELLING GOVERNMENT INTEREST UNRELATED TO THE SUPPRESSION OF EXPRESSION CAN JUSTIFY THE FLAG PROTECTION ACT'S INFRINGEMENT OF FREEDOM OF SPEECH

Because the Flag Protection Act encompasses high-value political speech within its prohibitions, and does so in a way that is explicitly or irreducibly viewpoint and content-based, the appropriate standard of review is the one employed to invalidate the convictions in *Johnson*: the "most exacting scrutiny." 109 S.Ct. at 2543. Under that standard, the statute must fall, for it advances closely no compelling interest unrelated to the suppression of expression. But even if the more lenient standard of *O'Brien* were applied, the statute would still be invalid, for its restriction of First Amendment freedoms is unnecessary to the furtherance of any plausible government

interest.

A. The Act Fails Strict Scrutiny

A content-based statute is invalid unless the government can demonstrate that it is "necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Boos v. Barry*, 485 U.S. at 321; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). Here that exacting test cannot be satisfied.[8]

Neither the Solicitor General nor his *amici* assert any end other than preservation of the flag as a symbol to defend the Flag Protection Act.[9] Nor could they. For this is not a case about protection of government property. Of course the government may protect the Washington Monument from defacement, even by the most political of graffiti, "[f]or there a governmental interest quite obviously unrelated to the suppression of expression is implicated, namely the cost and trouble of sandblasting." Ely, "Flag Desecration," 88 Harv.L.Rev. at 1504. Likewise for rebuilding costs if the weapon is the blow torch rather than the spray gun. Nor is this a case about protection of another's private property from theft or destruction; this case presents squarely the issue only of burning a flag of one's own. And plainly no bar on incitement to riot is implicated here. While the state may have a compelling interest in suppressing words or symbols -- even on the basis of their content -- when used as the literal triggers of violence, this Court has long since rejected vague and generalized predictions of such consequences as inadequate. Rather, the Court has required a highly particularized showing before incitement may be suppressed. The state must prove that speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Texas fell far short of such a showing in *Johnson*. *See* 109 S.Ct. at 2541-42.[10] No doubt discouraged by Texas' example, the government from no quarter even attempts a breach-of-peace rationale in the cases before the Court here.

What government interest remains to be counted? One and only one: the "government's affirmation of national values" through preservation of the flag as "symbol of all that this Nation stands for." Biden Brief at 14, *quoting* Justice (then Judge) Scalia in *Block v. Meese*, 793 F.2d 1303, 1314 (D.C.Cir. 1986), *quoting* L. Tribe, *American Constitutional Law* 588, 590 (1st ed. 1978); Biden Brief at 19. Because that interest is related to the suppression of expression, as argued above in Point II, it is doubtful whether it may come into play as a justification at all. But even if the legitimacy of that interest is conceded, it cannot be found either compelling or closely met.

The government in effect argues that it has a compelling interest in keeping the message it beams out through the flag free of static, interruption, or interference -- like keeping a private speaker free from a heckler's veto. But even if the interest in government speech were as weighty as that of a private speaker, it is captious to claim that banning flag-burning is essential to preserving it, or as Senator Biden puts it, that permitting

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[8] The Court has appropriately treated viewpoint-based statutes with even greater skepticism. Indeed, this Court has never upheld a viewpoint-based statute against First Amendment challenge.

[9] As noted earlier, the use of the flag as an "incident of sovereignty" is indistinguishable from its use as a political symbol, notwithstanding the contrary assertion by the House leadership. *See* p.4, *supra*.

[10] As the Court stated: "To accept Texas' arguments that it need only demonstrate 'the potential for a breach of the peace,' . . . and that every flag-burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do." 109 S.Ct. at 2542.

flag-burning will reduce government to "a philosophical cipher, standing for absolutely nothing." Biden Brief at 14. This case is not about limits on government speech. There is no issue here about the government's own display or treatment of the flag, nor about efforts to promote voluntary respect for the flag or particular conceptions of patriotism. At issue here is a criminal proscription of an offending and disfavored expression by private persons. And this Court has a long tradition of First Amendment protection against government's compulsory promotion of its messages through its citizens' mouths or property.

Two examples should suffice. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), declared that people cannot be compelled to affirm their patriotism by saluting the flag. And *Wooley v. Maynard*, 430 U.S. 705 (1977), held that the First Amendment precluded the state of New Hampshire from punishing criminally those who willfully obscured the state motto "Live Free or Die" on license plates issued by the state as a condition of the privilege of driving on the state's highways.

It is no answer to say that here, unlike *Barnette*, the government compels symbolic silence rather than speech. For *Wooley* clearly established that compulsion may no more be used to silence private expression that would block or obscure the government's attempted broadcast of its own favored message than it may be used to secure affirmation of a particular government-ordained view. As Professor Ely puts it, "Orthodoxy of thought can be fostered not simply by placing unusual restrictions on 'deviant' expression but also by granting unusual protection to expression that is officially acceptable." Ely, "Flag Desecration," 88 Harv.L.Rev. at 1507.

Thus on the appropriate test, that of strict scrutiny, the Flag Protection Act must fall.

B. The Act Fails The *O'Brien* Test

Even if the Court were to accept the characterization of the Flag Protection Act as content-neutral -- a characterization that would be extraordinary, as argued above -- it should strike it down nonetheless on the *O'Brien* standard. For even if the interest in preserving the flag as a symbol of national unity were deemed substantial and unrelated to ideas (a seeming contradiction in terms), the Act would fail the third hurdle *O'Brien* poses: that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. The *only* way that the government could maintain all draft cards intact in the possession of their recipients was to bar their destruction; the justification accepted in *O'Brien* thus rested on a virtual tautology. But there is no similarly close fit here. Flag-burning does not undermine the government's symbolism as draft-card-burning undermines the draft; to the contrary, people choose to burn the flag to express dissent precisely because it is such a powerful symbol. Moreover, because a flag is not a thing but rather a symbol, destruction of what the government would protect is conceptually impossible; the burning of one of more physical instantiations of the flag's symbolism cannot obliterate its symbolic value.

Thus here, unlike the case in *O'Brien*, the law is not narrowly tailored to its purported goals. Yet even with respect to laws deemed content-neutral, the First Amendment demands more than a metaphorical connection between means and end. On even the more lenient *O'Brien* test, therefore, the Flag Protection Act must fall.

CONCLUSION

For the reasons stated herein, the decisions below should be affirmed.

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